IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN,

Petitioner,

v.

CARLISLE & JACQUELIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST OF *AMICUS*

Movant NAACP Legal Defense and Educational Fund, Inc., respectfully moves the Court for permission to file the attached brief *amicus curiae,* for the following reasons. The reasons assigned also disclose the interest of the *amicus.*

(1) Counsel for the petitioner has consented to the filing of a brief *amicus curiae* by the movant. The present motion is necessitated because counsel for the respondents have refused consent.

(2) Movant NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on

account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

(3) Over a long period of time, LDF attorneys have handled hundreds of class action cases in the federal courts whose object has been the securing of equal civil rights for Blacks and other minorities. Because of the readily available class action device, LDF has been able to benefit large numbers of persons to an extent that would have been otherwise impossible. We are concerned that a decision upholding the lower court's narrow and restricting interpretation of the class action rule might have a similarly limiting effect on the rule's applicability to civil rights litigation. Thus, *amicus* has a vital interest in this case beyond that of the immediate litigants and therefore presents in the attached brief additional considerations in support of petitioner's position.

WHEREFORE, movant prays that the attached brief *amicus curiae* be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

ARGUMENT

I.

Introduction

As noted in the statement of interest, *amicus* has been engaged for many years in a comprehensive program of litigation in the federal courts to secure the constitutional and statutory rights of Blacks and other minorities. Over a period of years we have gained much practical experience in class action litigation under both the old and the revised version of Rule 23. Drawing on this experience, this brief will seek to demonstrate the indispensability of the class action as a device for furthering the national purpose of

achieving full equality, and the crippling effect on the class action that would result if restrictive notice and other requirements were imposed.

We are cognizant of the fact that, viewed narrowly, the present case only involves action brought under Rule 23(b)(3), while most litigation involving the enforcement of civil rights is brought under Rule 23(b)(2). However, in its 1968 opinion, the Court of Appeals rejected petitioner's position that the mandatory notice requirements involved in this case apply only to actions brought under 23(b)(3) and that therefore 23(b)(2) cases were subject only to the discretionary notice requirements of Rule 23(d)(2). The Court stated: "[W]e hold that notice is required *as a matter of due process in all* representative actions." 391 F.2d 555, at 564.

The third *Eisen* opinion makes it clear that the Court of Appeals based its ruling on a notion that strict adherence to notice requirements is required by the due process clause. Thus, its reasoning could be applied to all class action litigation regardless of which provision of Rule 23 is invoked. Moreover, the entire thrust of the lower court's decision is to remove from federal district judges discretion to deal with class actions in a flexible and innovative way. The Second Circuit has read the requirements of Rule 23 in the light of the due process clause as imposing rigid rules that will absolutely bar the maintenance of a class action unless they are adhered to.

Our concern is that such rules could have precisely the opposite effect as that contemplated by Rule 23; that is, the mandatory and discretionary notice requirements of Rule 23 are designed to protect the rights of members of the class on whose behalf such an action is brought. If they were applied in such a way as either effectively to eliminate the possibility of maintaining a class action or

to bind members of the class before the merits of an action are even explored, the result would only be to destroy or make unenforceable the rights of the very persons whom Rule 23 was designed to protect.

II.

The Role of the Class Action in Civil Rights Litigation

The Fifth Circuit has recognized that "racial discrimination is by definition class discrimination" (*Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). In order effectively to remedy such discrimination, therefore, an action must be maintainable on behalf of the entire class against whom the discrimination has been directed. Thereby the evidence adduced may relate not only to individual plaintiffs but also may go to prove the overall patterns of racial bias involved. Moreover, in such an action the court is able to grant relief that will deal not only with the immediate probems of the individual plaintiffs but that will correct practices that deny the rights of the entire class.

These principles were fully recognized in civil rights cases brought under the predecessor to the present Rule 23(b)(2). Thus, in *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963), the court based its holding that a school desegregation case *must* be maintainable as a class action on the ground that class-wide relief was necessary. See also, *Hall* v. *Werthan Bag Corporation*, 251 F.Supp. 184 (M.D. Tenn. 1966) (employment discrimination); *Lance* v. *Plummer*, 353 F.2d 585 (5th Cir. 1965) (public accommodations).

Lance provides a vivid illustration of the importance of being able to obtain class-wide relief. One of the earliest

cases brought under Title II of the Civil Rights Act of 1964, *Lance* was brought by eight named Black plaintiffs who sought relief on behalf of themselves and all other Black persons similarly situated. An injunction was issued by the district court on behalf of the class, prohibiting racial discrimination in public accommodations. Shortly thereafter, three Black persons who were not named plaintiffs were discriminated against in violation of the injunction, but were able to obtain immediate relief because they were members of the protected class. *Lance* is typical of many cases in that not only did its maintenance as a class action save the time and resources of individual members of the class, but also greatly diminished the burden on federal courts that would inevitably result if it were necessary for every aggrieved person to file his own lawsuit.

It is clear from the Advisory Committee's report to the revised Rule 23, that its drafters were fully aware of the development of the law in civil rights class action cases. Indeed, 23(b)(2) was intended, in substantial part, to codify those decisions which permitted such cases, and, indeed, to remove any doubts as to their maintainability. See, Advisory Committee's Report to Proposed Rule 23, 39 F.R.D. 73, 102, and cases there cited.

In light of the intent of the Advisory Committee, it may be presumed that there was no intention to require the imposition of rigid rules relating to notice and other matters that would have the effect of limiting the availability and effectiveness of civil rights class actions as they already existed under Rule 23. Indeed, early decisions liberally construed the new class action rule in such cases in a variety of contexts. See, *e.g., Jenkins* v. *United Gas Corporation,* 400 F.2d 28 (5th Cir. 1968) (granting of relief to named plaintiff does not moot claims of the class); *Huff* v. *N.D. Cass, Co.,* —— F.2d ——, 6 EPD

¶8800 (5th Cir., Sept. 4, 1973), and *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) (named plaintiff may enforce claims of all Blacks discriminated against, and need not prove that his own claim has merit as a condition of doing so).

Further, and of great importance, the courts recognized the necessity of flexibility in administering class action cases in order to accomplish both goals of Rule 23; the protection of the rights of absent members of the class, while not at the same time cutting off any realistic possibility of their vindication. For example, in *Johnson, supra,* the Fifth Circuit, while noting that, contrary to *Eisen,* notice was *not* mandatory under Rule 23(b)(2), suggested that appropriate notice could be used by the district court if necessary. 417 F.2d at 1125.

Of course, the *Eisen* requirement that all potential and identifiable members of a class must be notified before an action may be maintained *at all* as a class action could have a devasting effect in many civil rights cases. For example, in at least one school desegregation case (*Baker* v. *Bd. of Public Instruction of Suwanee Cty., Florida,* (M.D. Fla., C.A. No. 73-796-Civ.-J-S)), a motion has been made to dismiss as a class action, citing *Eisen.* The typical school case is brought by a number of individuals as representative of all Black school children in a district. The number of persons in the class is substantially less than that involved in *Eisen;* their identity is as easily ascertainable through school district records. Just as in *Eisen,* however, the requirement that all members must be notified at the cost of the plaintiffs would effectively prohibit the bringing of a class action, particularly in school districts with tens or hundreds of thousands of students. The problem is even more acute since virtually all the private school desegregation litigation is conducted

by a single organization, the Legal Defense Fund, *amicus* in this case. The end result would be that school cases might only be able to be brought and relief obtained on behalf of the individual plaintiffs, leaving the federal courts in the anomalous position of leaving intact illegal and unconstitutional practices. Cf., *Potts* v. *Flax,* 313 F.2d 284, 289 (5th Cir. 1963); *Bradley* v. *School Bd. of Richmond,* 317 F.2d 429 (4th Cir. 1963).[1]

This is, of course, the crux of the *Eisen* rule, and why it must be rejected. *Eisen* purports to protect the rights of absent members of the class. In practical effect, it will have precisely the opposite effect; it will insulate those whose actions injure large numbers of persons from effective corrective action.[2] This result should not obtain in a case involving the rights of consumers or the class involved in *Eisen;* it would be all the more anomalous if a rule supposedly based on a purported constitutional right of class members to notice had the effect of rendering unenforceable their constitutional right to be free of class discrimination.

Indeed, the Constitution may require precisely the opposite result than that reached in *Eisen.* That is, if a restrictive notice requirement has the effect, as a practical matter, of cutting off substantial numbers of persons from the

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[1] *Amicus* does not mean to suggest, of course, that other members of the class, or other affected persons, could not participate in such a case if they desired. A school desegregation case is inevitably one of public interest; there is effective notice of its pendency. In many instances, interested groups or individuals make their views known through intervention or appearance as *amicus.* The point about *Eisen,* on the other hand, is that it mandates cripplingly expensive individual notice regardless of adequate alternative notice.

[2] It is significant that those who support the *Eisen* rule are not those involved in protecting the rights of consumers, etc., but are those against whom such class actions may be brought.

vindication of their constitutional rights because they lack the resources to pursue their claims individually, then it would violate due process. Thus, contrary to the view of the court below, Rule 23 should be read liberally in order to avoid this constitutional problem.

The potential effect of an affirmance of *Eisen* extends beyond the immediate question of whether personal notice must be given to class members at plaintiffs' expense. It has been the experience of *amicus* that lower federal courts have felt it necessary to impose a variety of other restrictive rules in class actions, and an approval of the *Eisen* court's attitude towards class actions could lead to an expansion of such devices.

The problems are most acute in actions brought under Title VII of the Civil Rights Act of 1964. Generally in such cases there are subclasses which are reasonably definable in term of the numbers of individual members. Thus, an action may be brought on behalf not only of all Blacks who may be discriminated against in the future by a company but also on behalf of the subclass of all present employees of the company. *Amicus* has no quarrel with requirements that seek to insure that the rights of absent members of a class are indeed protected. The problem is that, as in *Eisen,* requirements are being imposed that have precisely the opposite effect; that is, in the guise of protecting the rights of class members, they are used as means to cut off or limit those rights.

For example, in *Moody* v. *Albemarle Paper Company,* —— F.Supp. ——, 4 FEP Cases 561 (November 9, 1971), *reversed on other grounds,* 474 F.2d 134 (4th Cir. 1973), the district court approved the use of a "proof of claim" form to be sent by the defendants at the very beginning of the litigation. Class members were required to state in writing any back pay claim that they might have within a

specified period of time. During this period counsel for the plaintiffs representing the class was prohibited from communicating directly or indirectly with class members. Thus, for all practical purposes, members of the class were cut off from effective advice as to their rights under the action and as to the consequences of the failure to exercise those rights. A failure to file a proof of claim resulted in back pay claims being "forever barred" even before any determination on the merits as to whether there would in fact be any back pay award. In *Bing* v. *Roadway Express, Inc.*, —— F.2d ——, 6 E.P.D. ¶ 8878 (5th Cir., October 15, 1973), the court upheld the issuing of a notice which required employees to indicate in writing within thirty days their interest in a particular job. Subsequently, the district court refused to consider any individual relief for persons who failed to respond to this notice. Again, the problem with these types of strict notice requirements is that they require uncounseled members of the class to state whether or not they will make a claim long before they know whether any claim has any chance of being upheld.

To summarize, the decision of the Court of Appeals in this case takes a restrictive approach to Rule 23 that is not justified by the rule's language or purpose. The imposition of rigid notice requirements before a class action may be maintained will not protect the rights of the members of the class. To the contrary, if district courts are stripped of the power to respond to problems that may arise in class actions in a flexible manner, then the result will only be that the constitutional and statutory rights of large numbers of aggrieved persons will go unvindicated.

Conclusion

For the foregoing reasons, the decision of the court below should be reversed.

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